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War Crimes and Truth Commissions: Some Thoughts on Accountability Mechanisms for Mass Violations of Human Rights

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The views expressed in this paper are those of the authors and not of USAID.

War Crimes Tribunals and Truth Commissions: Some Thoughts on Accountability Mechanisms for Mass Violations of Human Rights

by Neil J. Kritz*[1]

The field of human psychology has taught the lay world a principle regarding personal emotion that is now taken as a given: to ensure good mental health and stability, it is crucial that individuals emerging from massive abuse and trauma develop appropriate mechanisms to confront and reckon with that past experience, facilitating closure rather than repression. Figuring out what approach or mechanism will be most helpful to the healing process will vary from person to person, and will be determined in part by the background and makeup of the particular individual as well as by the nature of the trauma endured. But for both victims and perpetrators of past abuse, dealing with the fact and consequences of its occurrence is essential.

Societies shattered by the perpetration of atrocities likewise need to adapt or design mechanisms to confront their demons, to reckon with these past abuses. Otherwise, for nations as for individuals, the past can be expected to infect the present and future in unpredictable ways. To assume that individuals or groups who have been the victims of hideous atrocities will simply forget about them or expunge their feelings without some form of accounting, some semblance of justice, is to leave in place deep resentments and the seeds of future conflict. Confronting this past in a holistic and meaningful manner will be a painful and delicate process, but a vital one.

Recent years have seen a paradigm shift, still under way, in attitudes toward the need for accountability and nations' confrontation with their own painful past. While diplomats and negotiators involved in efforts to curtail violent disputes previously might have dismissed any focus on past atrocities to be an obstacle to stability and the resolution of conflict, today it is increasingly recognized as an integral and unavoidable element of the peace process. As examples, although recent peace accords to conclude civil wars in El Salvador, Bosnia, and most recently Guatemala may each have their respective weaknesses in ensuring accountability, they all reflect this paradigm shift, acknowledging and incorporating basic principles to deal with the legacy of past violations and recognizing that a durable peace would be unobtainable without them.

The last 50 years have seen the development, in nearly as many countries, of a variety of mechanisms of accountability for mass abuses. The present essay will offer some observations regarding the effectiveness of some of these approaches and some modest

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guidelines as to their appropriate application.[2]

Criminal Trials

In helping societies deal with a legacy of past mass abuses, the process of criminal accountability can serve several functions. Prosecutions can provide victims with a sense of justice and catharsis—a sense that their grievances have been addressed and can more easily be put to rest, rather than smoldering in anticipation of the next round of conflict. They provide a public forum for the judicial confirmation of historical facts. They can also establish a new dynamic in society, an understanding that aggressors and those who attempt to abuse the rights of others will henceforth be held accountable. Perhaps most importantly for purposes of long-term reconciliation, this approach makes the statement that specific individuals—not entire ethnic or religious or political groups—committed atrocities for which they need to be held accountable. In so doing, it rejects the dangerous culture of collective guilt and retribution that often produces further cycles of resentment and violence.

Confidence that legal or political protection from prosecution will follow the commission of mass crimes only gives confidence to those who would contemplate perpetrating them. It also conveys to victims a very real sense that their powerlessness and helplessness are more assured. A variety of factors may ultimately require limiting prosecution to senior key individuals or certain categories of perpetrators, as will be discussed further below. Total impunity, however, in the form of comprehensive amnesties or the absence of any accountability for past atrocities, will be immoral, injurious to victims, and in violation of international legal norms. It can be expected not only to encourage new rounds of mass abuses in the country in question but to embolden the instigators of crimes against humanity elsewhere as well. In short, criminal prosecution in some form must remain a threat and a reality.

International Prosecution of Mass Abuses

When trials are undertaken, are they better conducted by an international tribunal—like those in Nuremberg and Tokyo or those for the former Yugoslavia and Rwanda—or by the local courts of the country concerned? There are sound policy reasons for each approach. An international tribunal is better positioned to convey a clear message that the international community will not tolerate such atrocities, deterring, one hopes, future carnage of this sort both in the country in question and worldwide. It is more likely

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[2]The present essay deals only with mechanisms of accountability. These, by definition, are focused on the perpetrators of abuse and their allies. Although not examined in the essay, a comprehensive and holistic approach to dealing with a legacy of past atrocities should also include a range of victim-focused efforts, such as programs for compensation and rehabilitation and establishment of memorials and commemorations.

to be staffed by experts able to apply and interpret evolving international standards in a sometimes murky field of the law. It can more readily function—and be perceived as functioning—on the basis of independence and impartiality rather than retribution. Relative to the often shattered judicial system of a country emerging from genocide or other mass atrocities, an international tribunal is more likely to have the necessary human and material resources at its disposal. An international tribunal can also do more than local prosecutions to advance the development and enforcement of international criminal norms.

Finally, where the majority of senior planners and perpetrators of these atrocities have left the territory where the crimes were committed or are otherwise inaccessible for apprehension and prosecution by national authorities (as is the case in both Rwanda and Bosnia), an international tribunal stands a greater chance than local courts of obtaining their physical custody and extradition. The corollary to this point, not always apparent in the approach of the international tribunals for the former Yugoslavia and for Rwanda, is that these international entities, as the only bodies able to do so, should focus their energies more heavily on the investigation and prosecution of the leadership ranks of those responsible for the atrocities in question than on the rank and file.

The Yugoslavia and Rwanda tribunals are in several ways an improvement on the Nuremberg model. Their rules of procedure incorporate positive developments over the past 50 years with respect to the rights of criminal defendants under international law. To the extent that Nuremberg was perceived as a prosecution of World War II's losing parties by the victors, the current tribunals are nothing of the sort. The countries that supply their judges and prosecutors are not parties to the conflict, and the Yugoslavia tribunal has investigated and indicted alleged war criminals from each side of the conflict.

Location and Accessibility of International Tribunals

At the time of the creation of the ICTY, location of the seat of the tribunal in the *locus delicti* was plainly not an option. A war was raging in the former Yugoslavia and the crimes in question were still being committed. In this context, the Hague was a reasonable place to put the new tribunal.

Following the 1994 genocide in Rwanda, the physical infrastructure of the country was in a shambles. The genocidaires had absconded with much that wasn't nailed down, and gutted much of what was. In examining options for the international tribunal, some in the UN also felt that it would be difficult to ensure the safety of tribunal staff in a country still in the early throes of clearing the dead and the rubble and trying to cobble together a new order. Given these considerations of logistics and security, the UN chose to place the seat of the Rwanda tribunal in Arusha, Tanzania. This location increases the challenge the tribunal faces in getting its message across to its primary audience, namely, the people of Rwanda. They, more than the rest of the world, need to see the tribunal at work, to be reminded on a daily basis that the international community is committed to the establishment of justice and accountability for the heinous crimes of 1994.

There is good reason why the post-World War II international prosecution of war criminals took place in Nuremberg and Tokyo, not in the Hague or some other foreign location. Had the latter been the case, the Nuremberg principles would still have been established, but no doubt with a less immediate impact on the ground. For an international tribunal to be maximally effective, victims and perpetrators should be able to feel that its activities are not far removed from them.

The basic principle applies not only to criminal tribunals, but also to other international bodies addressing past abuses. The effectiveness and local impact of the UN Truth Commission for El Salvador was undoubtedly enhanced by its extended physical presence in the country. The Commission's international staff was located in El Salvador for six of the Commission's eight months of work, and the three Commissioners were in the country two weeks per month on average. It is axiomatic that the weaker the connection between the international operation and the local population, the easier it will be for its work to be ignored or dismissed as an alien effort irrelevant to concerns in the country.

The statute of the Rwanda tribunal authorizes it to sit outside of Arusha as it deems appropriate; the tribunal would be well advised to exercise that authority and conduct some of its proceedings in Rwanda. Particularly for a country like Rwanda, where a substantial percentage of the population cannot benefit from newspaper or television coverage of the trials, the process of justice should be accessible and visible. In addition, at a time when some Western observers raise concerns over due process in Rwanda's domestic genocide trials, hearings of the tribunal inside the country would also serve as an important visible model and standards-setter for the local efforts. At the same time, sitting for tribunal cases inside Rwanda would more readily convey the concept that the international and domestic trials are complementary parts of an integrated, holistic, and multifaceted approach to justice.

When an international tribunal determines that it cannot hold its sessions in the country where the alleged crimes took place, it is extremely important to ensure maximum access for the people of that country—again, both the victims and the perpetrators—through means other than physical attendance at hearings. Efforts undertaken to broadcast proceedings from the Hague into the former Yugoslavia, or from Arusha into Rwanda, and to enable witnesses to participate in some ICTY hearings via video links, are important steps in this direction.

For international tribunals to be maximally effective, more attention will need to be given to both the physical accessibility of proceedings and the dissemination of objective information to the local population.

Domestic Prosecutions

Prosecution of war crimes before domestic courts can also serve some important purposes, distinct from those that underlie international trials. It can enhance the legitimacy and credibility of a fragile new government, demonstrating its determination to hold individuals accountable for their crimes. Because these trials tend to be high-profile proceedings that receive significant attention from the local population and foreign observers, they can provide an important focus for rebuilding the domestic judiciary and criminal justice system, establishing the courts as a credible forum for the redress of grievances in a nonviolent manner. Finally, as noted in 1994 by the UN Commission of Experts appointed to investigate the Rwandan genocide, domestic courts can be more sensitive to the nuances of local culture, and resulting decisions "could be of greater and more immediate symbolic force because verdicts would be rendered by courts familiar to the local community."[3]

Finally, even where an international tribunal has been established to prosecute war crimes, an additional factor motivating separate local efforts at justice is the sheer pressure of numbers. For reasons of both policy and practicality, the international tribunals for Rwanda and the former Yugoslavia can be expected to limit their prosecutions to a relatively small number of people. By way of comparison, the Nuremberg operation had vastly more substantial resources than its two contemporary progeny. At peak staffing in 1947, for example, the Nuremberg proceedings employed the services of nearly 900 allied personnel and about an equal number of Germans—more than four times the number of staff of the Yugoslavia tribunal. The authorities at Nuremberg had virtually complete control of the field of operations and sources of evidence, and the prosecution team had the benefit of paper trails not matched in the Yugoslav and Rwandan cases. Even with these advantages, the Nuremberg trials ultimately involved the prosecution of only some 200 defendants, grouped into 13 cases and lasting four years. The two current international tribunals *combined* will not ultimately prosecute this many cases, nor need they; even half the number will be a major success.

This means that, even if the international bodies achieve their maximum effectiveness, there is an important complementary role for domestic process. In the case of the former Yugoslavia, the cases of thousands of war criminals—Bosnian Serbs, Croats, and Muslims—and tens of thousands of their victims will not be addressed by the international tribunal, and reconciliation requires that Bosnian society come to terms in some fashion with this legacy and these people. My own discussions with Bosnian authorities from each of the three ethnic groups indicate that they collectively claim at least 25,000 war crimes cases and regard some 5,000–8,000 of these as appropriate for prosecution. This dimension of the problem of war crimes in Bosnia has received surprisingly little attention in the Western policy community, particularly considering its potential impact. But it is a reality that Bosnia needs to deal with whether by prosecution

[3]Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935 (1994) (29 September 1994), p. 31.

or otherwise.

Managing the Numbers

Where prosecutions are undertaken, how widely should the net be cast? There is a growing consensus in international law that, at least for the most heinous violations of human rights and international humanitarian law, a sweeping amnesty is impermissible.[4] International law does not, however, demand the prosecution of every individual implicated in the atrocities. A symbolic or representative number of prosecutions of those most culpable may satisfy international obligations, especially where an overly extensive trial program will threaten the stability of the country. This approach has been adopted, for example, in Argentina, Malawi and in some of the countries of central and Eastern Europe in dealing with the legacy of massive human rights abuses by their ousted regimes. In several cases ranging from Nuremberg to Ethiopia, given the large number of potential defendants, an effort has been made to distinguish various categories of culpability and design different approaches for each.

The Rwandan case demonstrates the need for pragmatism to temper an absolutist approach to prosecution. Following the 1994 genocide, many senior members of the new government insisted that *every person* who participated in the atrocities should be prosecuted and punished. This approach, however, would put more than 100,000 Rwandans in the dock, a situation that would be wholly unmanageable and certainly destabilizing to the transition. To compound the problem, the criminal justice system of Rwanda was decimated during the genocide, with some 95 percent of the country's lawyers and judges either killed or currently in exile or prison. By mid-1997, some 115,000 Rwandans were detained on allegations of involvement in the genocide in prisons built to house a fraction of that number, while the national Ministry of Justice still had just seven attorneys on its staff. Justice for war crimes in Rwanda requires a creative approach that takes into account the staggeringly large number of potential cases and the overwhelmingly small number of available personnel to process them.

After extensive deliberation and input from a number of experts in various countries, the Rwandan government enacted legislation in 1996 that attempts to respond to this challenge. The law creates four levels of culpability for the genocide: 1) the planners and leaders of the genocide, those in positions of authority who fostered these crimes, particularly notorious killers and sexual torturers; 2) others who killed; 3) those who committed other crimes against the person; and 4) those who committed offenses against property. All those in the first category are subject to full prosecution and punishment. Provision of a series of incentives for people in categories 2) and 3)—by far the largest categories—to come forward voluntarily and confess will, it is hoped, shift

[4] *See, e.g.,* Diane F. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime," 100 *Yale Law Journal* 2537-2615 (1991).

some of the burden for preparing cases away from prosecutors and investigators, rendering the number of cases remaining for prosecution slightly more manageable. Specifically, those in these two groups who participate in the "confession and guilty plea procedure," which includes a full confession of their crimes, including information on accomplices or co-conspirators, will benefit from an expedited process and a significantly reduced schedule of penalties.

Notably, Rwanda has also introduced an intriguing innovation. Unlike South Africa's amnesty program, in which perpetrators need only confess to their crimes (and some have done so accompanied by a vigorous defense and justification of their actions), those Rwandans who confess to their role in the 1994 genocide in exchange for lenient treatment need to do one more thing: they need to formally apologize to their victims. In managing overwhelming numbers, the Rwandan program assumes that victims will more easily accept leniency for those who committed atrocities if the latter express some remorse. It assumes that in this way, the process of criminal accountability may become more effective in facilitating national reconciliation. Finally, those in category 4) will not be subject to any criminal penalties.[5]

Ensuring fairness and transparency in domestic trials

The mere holding of trials will not, by itself, contribute to a sense of justice or process of reconciliation; in addition to supplementing trials with some of the other mechanisms discussed below, these goals need to be consciously incorporated into the strategy of prosecution. Adherence to the universal norms regarding fair trials is an essential element in this equation. The Bosnian case is illustrative.

In a situation like Bosnia, however, one confronts a still deeply divided society, both politically and structurally. Jurisdiction over prosecution rests in the authorities of two ethnically dominated substate entities, such as the Federation of Bosnia and Herzegovina and Republika Srpska. Unfortunately, too many players in Bosnia today view trials for war crimes not as a method of advancing accountability and reconciliation, but rather as one more means of continuing the conflict. On one side of the ethnic divide, the Bosniak/Croat-dominated Federation has emphasized the prosecution of Serbs for wartime atrocities; in the trials in Republika Srpska, the defendants have been Bosniaks. These trials can still serve an important and constructive societal function, but need some course corrections to do so. In cases on each side of the divide, there have been difficulties in enabling defense attorneys or witnesses to cross the "inter-entity boundary line" to participate in war crimes trials, essential to ensuring the trials' legitimacy and credibility. Trials conducted under such circumstances are hardly ideal vehicles for achieving a sense of justice, healing or confidence-building between the parties. Instead, they can have the

[5]A useful article describing the efforts at justice is William A. Schabas, *Justice, Democracy, and Impunity in Post-genocide Rwanda: Searching for Solutions to Impossible Problems*, 7 CRIMINAL LAW FORUM 523 (1996).

opposite effect.

Given the extent to which such war crimes trials will automatically be suspect on each side of the conflict as political exercises, prosecution authorities are well advised to conduct trials that are public and accessible to all and that uphold international fair trial standards—including those regarding right to counsel and the introduction and examination of evidence and witnesses. The Bosnian domestic trials, *if* they are conducted in accordance with such standards, will necessarily facilitate communication and participation across the ethnic divide. They can expose people in each community to the fairness of the criminal justice process on the other side, including its respect for the defense rights of ethnic minorities. They can also expose each ethnic community to the facts of wartime abuses suffered by the other.

Prosecution and judicial authorities in Bosnia's Muslim, Croat, and Serb communities recognize the need to move in this direction. The credibility and constructive impact of their respective efforts in the war crimes area will be greatly enhanced by measures to more aggressively ensure the rights of the accused and to expand opportunities for victims on each side to be exposed to and participate in trials on the other. A July *Roundtable on Justice and Reconciliation in Bosnia and Herzegovina* brought together a group of 22 senior officials from each of the three Bosnian ethnic communities responsible for dealing with war crimes. They discussed collectively, for the first time, how the legacy of war crimes will be addressed in their divided country. Prosecutors and judges from each side agreed on recommendations to facilitate cross-entity cooperation in these matters, including measures to allow the participation of defense counsel and witnesses in each other's trials.[6]

Enforcement Capacity

While the authorities in charge of the Nuremberg and Tokyo trials had complete control of the field, the current Rwanda and Yugoslavia tribunals have not had that luxury. This has been manifest in efforts to enforce the tribunals' orders, particularly regarding arrests. There may be an international doctrine gradually emerging which holds that, at least in the aftermath of widespread atrocities, justice is a necessary element of any stable peace. If so, this is nothing less than a sea change in international thinking on this

[6]The Roundtable, convened from July 2–4 in Strasbourg, was jointly sponsored by the United States Institute of Peace, the OSCE Office for Democratic Institutions and Human Rights, and the Secretary-General of the Council of Europe. The Bosnian participants included the Minister of Justice of Republika Srpska, judges of the Supreme Courts of the Federation of Bosnia and Herzegovina and of Republika Srpska, chief prosecutors, cantonal ministers of interior, and leaders of the three respective war crimes commissions. Other participants included senior officials from the International Criminal Tribunal for the Former Yugoslavia, the Office of the High Representative and the International Police Task Force, experts with relevant experience from other countries that have grappled with this difficult question (e.g., a member of South Africa's Truth and Reconciliation Commission), and those engaged in legal institution-building in Bosnia.

question. But sea changes occur gradually, and there is not yet an accompanying doctrinal acceptance of the responsibilities that come with establishment of these international criminal tribunals. States and municipalities cannot expect their courts to enforce criminal law on their own without the enforcement power of the police; the international community similarly cannot create these international criminal tribunals without being willing to provide these institutions with assistance and muscle to enforce their orders and decisions. We have recently seen some positive developments on this point for both tribunals, a trend that will, it is hoped, continue.

This principle applies to domestic prosecution of war crimes as well. Despite discomfort in some circles regarding police assistance, particularly in countries in which the police have been an instrument of abuse, it is increasingly recognized that stability and the rule of law cannot be established in the absence of a reformed and credible police force. International assistance to the process of domestic criminal justice generally needs to include properly coordinated police training and material assistance.

The Role of the Media

Even where war crimes trials are characterized by fairness, transparency, and public access, any positive impact on public sentiment can still be undermined by a politicized, non-objective local press. In Bosnia, for example, the media constitutes an obstacle to the process of justice as a means to reconciliation. Local media should provide objective information regarding wartime atrocities and their prosecution on all sides, thereby providing the kind of exposure and public education regarding the trial process and the suffering inflicted on others referred to above. Instead, the media dominated by each ethnic group routinely and rapidly lionizes every member of that group accused of war crimes, automatically portraying them as heroes and martyrs regardless of the facts available or the fairness of the trial process. In such cases, it is vital that a program of media training on the process of justice be undertaken, so that the media can provide responsible coverage and serve a positive function in the process of justice and reconciliation.[7]

The Need for Better Interaction Between Those Involved in Parallel Processes of Prosecution

The draft statute for the permanent international criminal court recognizes the central role of domestic accountability mechanisms, declaring that the international body is be "complementary to national criminal justice systems in cases where such trial

[7]At the Strasbourg roundtable referred to above, some Bosnian participants went further and suggested that regulation of, or pressure on, those who control local media may be required to supplement such training.

procedures may not be available or may be ineffective."[8] This concept of "complementarity" is one of the more nettlesome problems facing those designing this permanent institution. As the present essay suggests, however, the basic tone and balance implied are correct.

There are obviously times when an international institutional response is necessary, either as a complement or as an alternative to a country's domestic reckoning with its own past abuses and atrocities. El Salvador, Bosnia and Rwanda arguably each fit this category. Unfortunately, however, this has resulted in some circles in an almost reflexive inclination to internationalize the accountability solution. This automatic preference for international responses should be resisted. The international donor community and the institutions for accountability that it creates need to promote the careful balance between the two, avoiding any action or attitude which could be viewed as dismissive towards national efforts at achieving justice in favor of an international response.

Both of the current experiments in international prosecution have demonstrated that improved lines of communication between international tribunals and local prosecution officials is essential. In the case of the Yugoslavia Tribunal, some confusion regarding the division of labor and authority between the two remains. At the July 1997 roundtable, which included both Bosnian officials responsible for war crimes prosecutions and senior officials of the ICTY, participants confirmed this ongoing uncertainty regarding such matters as the "rules of the road" which regulate local arrests and criminal proceedings; they were unanimous in identifying the need for regularized communication between local prosecutors and the Tribunal. In the case of the Rwanda Tribunal, improved lines of communication with Rwandan officials has enhanced the tribunal's work and credibility.

There are several reasons which should be obvious to assign a higher priority to effective interaction between an international tribunal and the domestic authorities and population of the country in question. First, the latter constitute the principal target "audience" for the tribunal's work. Victims and perpetrators of war crimes alike have to be able to see both that the international community will not tolerate genocidal atrocities, and that all accused will be treated fairly and objectively. Second, national and local officials possess important information that will be valuable to the tribunal. Third, it must be recognized that one of the first casualties (if not causes) of wide-scale abuses is the ineffectiveness of local institutions of accountability. In keeping with the medical imperative to "do no harm," international responses to these abuses need to be structured in such a manner as not to further undermine their credibility by usurping their authority and being dismissive of the vital role to be played by local institutions of justice. Finally, the international tribunal should serve as a reasonably accessible model of judicial and

[8]Report of the International Law Commission on the work of its 46th session, UN GAOR, 49th Sess., Supp. No. 10, at 44, UN Doc. A/49/10 (1994).

prosecutorial professionalism and standards of criminal procedure for the local system of justice; to do so, it needs to be less resistant, in fact more consciously proactive, in its interaction with domestic justice officials than has tended to be the case in the last few years. The ultimate goal must be to make the local system sufficiently robust so as to help prevent the occurrence of future atrocities.

Consideration should also be given to expanded contact between the judges and staff of international tribunals and their local counterparts on matters unrelated to the coordination of their respective war crimes work. It is, of course, essential that an international tribunal maintain an arms-length relationship with local authorities, maintaining both the reality and appearance of neutrality and independence. But neutrality does not require being continuously cocooned inside the tribunal, and such an approach arguably undermines support. If, as should be the case, international tribunals are staffed by highly qualified personnel, seasoned professionals with a commitment to justice and a knowledge of their own legal systems, then they can help in the reconstruction of the system of justice in their host country through a variety of forms of interaction, such as participation in discussions and exchanges on due process and fair trial standards, lectures at local law schools or judicial training academies, or interaction with the general public. This could be accomplished without taking their time away from their primary mission and without compromising the tribunal's neutrality. To the contrary, if done well, actively engaging with the public can be a useful tool in promoting awareness and support of the tribunal's work.

Non-criminal Sanctions

In virtually all cases of mass abuses, accountability via criminal trials—whether international or domestic—must necessarily be selective. Mass atrocities of the kind under consideration can only be perpetrated by a large number of people. Given the enormous numbers, prosecution of every single participant in the planning, ordering or implementation of the atrocities in question—not to mention all those who collaborated with them—would be politically destabilizing, socially divisive, and logistically and economically untenable.

As a consequence, the approach to accountability which is often applied to the largest number of people in societies dealing with the aftermath of war crimes, repression or other mass abuses is the use of a variety of non-criminal sanctions. Because of positions held in the former regime, or because of nominal implication or a more significant role in the machinery of abuse, individuals may be excluded from certain elected or appointed office. They also may be excluded from positions outside the government sector from which they might be able to have an influence on society; depending on the country, this has ranged from senior posts in the banking industry to the press to jobs as schoolteachers. Such exclusions are often temporary, allowing a "cooling off" period to rebuild confidence in these institutions before allowing anyone from the old order to participate anew.

Examples of the use of non-criminal sanctions are numerous. In the Czech Republic, Lithuania, and post-communist Germany, administrative purges have temporarily removed those affiliated with past abuses from certain positions in the public sector, with a particular emphasis on those who are alleged to have collaborated with the former secret police. In post-war France, the process of "epuration" affected tens of thousands of people. Nearly 1,000 politicians, 6,000 teachers, and 500 diplomats were vetted for possible collaboration with the Vichy regime. Such measures were not limited to positions in government, but were extended to the private sector as well. Separate purge committees were set up for writers, composers, artists, the press and entertainers, among others. Italian authorities dismissed some 1,600 government employees following its own "epuration" process. he Greek government's handling of accountability for abuses committed during the 1967-74 rule by a military junta, separate from the prosecution of more than 400 former officials or members of the military, involved the administrative dismissal of as many as 100,000 people.

In El Salvador, an "Ad Hoc Commission" established under the peace accords, composed of three Salvadoran civilians, reviewed the human rights record of military officers and, in a confidential report to the President and the UN Secretary-General, recommended the removal or demotion of more than one hundred of them—including the Minister and Deputy Minister of Defense—on the basis of their involvement in past abuses. Implementation of these recommendations meant a greater degree of accountability than many in El Salvador had thought possible.

A little-noticed and little-enforced provision of the Dayton peace accords defines as a confidence-building measure the obligation of the parties to promptly undertake "the prosecution, dismissal or transfer, as appropriate of persons in military, paramilitary, and police forces, and other public servants, responsible for serious violations of the basic rights of persons belonging to ethnic or minority groups."[9] It is significant to note that this provision for accountability extends to a much broader class of individuals than simply those indicted for the commission of war crimes. This recognizes a simple reality: even though it's not necessary or possible to prosecute everyone who committed abuses, how secure will a community member feel if the local police include the very criminals who last year tortured his son or gang-raped his wife? What confidence can returning refugees be expected to have in the new order if the current mayor personally helped torch their homes in the campaign of ethnic cleansing?

If properly administered, non-criminal sanctions can serve many important functions. They obviously make much more plausible the processing of large numbers of cases. They can provide society with a sense that justice and accountability have been established, and facilitate greater confidence in the credibility of the institutions and personnel of the new order. They allow victims the knowledge that those responsible for

[9]Dayton Agreement, Annex 7, Article I, Paragraph 3(e), 35 I.L.M. 89 (1996).

their suffering will not be permitted to remain in their positions of influence.

Arguably, however, even though employed so often, non-criminal sanctions against those implicated in past abuses have rarely been applied fairly. By their nature, administrative purges tend to be large scale and do not generally afford those affected anywhere near the level of due process protections that are provided to defendants in criminal proceedings. Because of their less formal and less public method, purge processes are also more easily subject to manipulation to serve inappropriate political purposes of the new regime to ensure its consolidation of power. Finally, if extended too broadly, purges have the potential of creating a large new, ostracized, and unemployed element within society, with destabilizing consequences.

Notwithstanding the fact that this accountability mechanism may be the most broadly applied, it has also received the least scholarly analysis and evaluation and has been the focus of minimal foreign technical assistance at best. Given the certainty that non-criminal sanctions will continue to be employed, creative thought and assistance needs to be given to this mechanism in the future. [10]

Historical Accountability: The Use of Truth Commissions

Over the past decade, several countries attempting to deal with the aftermath of massive repression have established commissions of inquiry or "truth commissions," generally comprised of eminent citizens charged with investigating the violation of human rights under the old regime (or during the civil war, as the case may be) and producing an official history of those abuses. In many of these countries, much of what had occurred was already generally known; what truth commissions can add is a meaningful *acknowledgment* of past abuses by an official body perceived domestically and internationally as legitimate and impartial. Such an entity cannot substitute for prosecutions—and rarely affords those implicated in their inquiry the due process protections to which they are entitled in a judicial proceeding—but it can serve many of the same purposes, to the extent that it: 1) provides the mandate and authority for an official investigation of past abuses; 2) permits a cathartic public airing of the evil and pain that has been inflicted, resulting in an official record of the truth; 3) provides a forum for victims and their relatives to tell their story, have it made part of the official record, and thereby provide a degree a societal acknowledgment of their loss; and 4) in some cases, establishes a formal basis for subsequent compensation of victims[11] or punishment

[10]The United States Institute of Peace plans to undertake a comprehensive comparative analysis, beginning in 1998, of the use of non-criminal sanctions in transitional societies.

[11]This approach was utilized, for example, in Chile, where one's identification in the report of the Commission on Truth and Reconciliation was automatic proof of one's eligibility for the compensation program. This prevented victims from having to go through a new and potentially painful process of proving their victimizations to administrators of this assistance.

of perpetrators. An increasingly standard feature of the truth commission mandate has been to analyze and report on not simply individual abuses, but the broader context in which they occurred and the structural elements of the government, security forces and society which made this pattern of violations possible—a context not generally obtainable in a criminal trial. Based on this assessment, the commission is then charged with proposing specific steps which ought to be taken to deal with past abuses and to preclude their repetition.

An advantage of the truth commission approach is that it can be organized and visibly begin functioning relatively quickly. To the extent that the international criminal tribunals for the former Yugoslavia or for Rwanda serve as guides, it can take years before trials by such tribunals actually begin. It will similarly take time to rebuild a weakened domestic criminal justice system to the point where it can undertake credible trials for war crimes or similar mass abuses. A truth commission can more promptly begin holding hearings and collecting testimony and documentation, which can then be turned over for use in prosecutions. In this sense, a commission of inquiry can also "buy time," relieving some of the immediate pressure for action while the courts and prosecutions are being organized.

Related to the time within which a truth commission can be organized is the amount of time allotted for its task. A truth commission should facilitate a degree of national consensus and closure regarding the facts of a troubled history. To be an effective catalyst, it is important that a truth commission's mandate be of limited duration. In Uganda, by way of illustration, the Commission of Inquiry into Violations of Human Rights was created in mid-1986 to examine the abuses committed under the Obote and Amin governments from 1962-86, a formidable task. A Supreme Court justice chaired the six-member body. Public hearings were accompanied by extensive television, radio and newspaper coverage, and by the hope of Ugandans and foreign observers for a significant process which might help to heal and to stimulate concrete corrective measures in response to past abuses. Unfortunately, the Commission of Inquiry dragged on for nearly a decade (partly owing to funding shortages, despite infusions from various foreign governments and foundations). Arguably, its effectiveness over time was reduced in inverse relation to its longevity, as people lost confidence in the Commission's potential as a mechanism for accountability and change.

On the other end of the spectrum with respect to timing and truth commissions, a mandate must be realistic in allowing a commission to properly fulfill its mission. The recently established Clarification Commission in Guatemala, provided for under the 1996 peace accords, has the daunting task of examining the "human rights violations and incidents of violence" committed over a 35-year period, during a civil war which left up to 150,000 dead or disappeared. It is expected to produce a report of "objective information about what transpired during this period [including] all factors, both internal and external" and recommend specific "measures to preserve the memory of the victims, to foster an outlook of mutual respect and observance of human rights, and to strengthen the

democratic process."[12] To do all this, the Commission is granted up to a year, a Herculean challenge to be sure.[13]

A common misperception is that the use of truth commissions and the holding of trials are mutually exclusive. This is not necessarily the case. The first truth commission of note, established in Argentina in 1983, produced significant amounts of information which was then utilized by the authorities in their prosecution of members of the military junta which had ruled the country. The two processes were complementary to one another.

South Africa has introduced a major innovation in its truth commission. In stark contrast to the blanket amnesties adopted in various Latin American countries emerging from periods of repression, amnesty is provided on an individual basis in South Africa for abuses committed under apartheid. The price of such amnesty is that the individual must apply and provide full details of their crimes to the Truth and Reconciliation Commission—a powerful incentive to come forward and assist the Commission in its work.That still doesn't mean, however, that South Africa has completely opted for truth-telling and amnesty instead of prosecution. Arguably, the only reason why the Truth and Reconciliation Commission has been as effective as it has been in eliciting thousands of confessions of apartheid-era crimes is because the threat of prosecution remains real. Any individual who did not apply for amnesty and submit a confession by the stated deadline is now at far greater risk of prosecution, given the extensive amount of inculpatory evidence obtained by authorities through the confessions of others. The degree to which criminal trials will expand following the conclusions of the Commission's amnesty application review process remains to be seen.

A powerful example of the utility of truth commissions in establishing a societal consensus on the history of past abuses, and of their ability to co-exist with and complement criminal trials, can be found today in Bosnia and Herzegovina. Three separate war crimes commissions exist, dominated respectively by Bosniak, Serb and Croat members and interests. Each has served some of the functions of a truth commission, insofar as they have provided a cathartic opportunity for victims from their

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[12]*Agreement on the Establishment of the Commission for the Historical Clarification of Human Rights Violations and Incidents of Violence that have Caused Suffering to the Guatemalan Population* (June 23, 1994).

[13]It bears noting that the use of truth commissions is still a relatively new phenomenon. Some very good research and analysis has been done with respect to this mechanism for dealing with past abuses. That said, many of the assumptions made about the effects and value of truth commissions, including those relied upon in the present essay, are based to some degree on instinct and anecdotal evidence, primarily from members and staff of the commissions and from those who testified before them. There is a need to develop more reliable empirical information. What were the effects of the truth commission on the much larger number of people in any of the countries in question—whether victims, perpetrators, or other members of society—who chose not to participate in the commission's investigations? What is the long-term impact on accountability and reconciliation where the truth-telling process was accompanied by a minimal program of criminal accountability? Further research is warranted.

respective ethnic communities to come forward and tell their story, ensuring that the suffering they endured and atrocities committed against their friends and relatives are memorialized in a formal manner. It is the intention of each of these commissions that their work will contribute to the process of prosecution of war crimes.

At the July 1997 roundtable referred to earlier, leaders of the three commissions also acknowledged, however, that they are in the process of creating three separate truths, three conflicting versions of history, the dissemination and perpetuation of which will facilitate not reconciliation but a hardening of the conflict between their ethnic communities. If, on the other hand, ways can be found to work together, each side being exposed to the abuses committed against the other two, verifying and acknowledging the victimization of their neighbors and producing one consensus on the atrocities suffered on all sides during the war, the process can be an important component of the effort at achieving justice and reconciliation. The participants (including local and international prosecutors) called for the creation of one Bosnia-wide truth commission to achieve these ends. Efforts are now under way to move this process forward, with the hoped that this commission will be established in the coming months.

Lessons Learned

To recap some of the principle lessons discussed thus far:

Prosecution strategy will generally need to be selective, and should factor in questions of capacity and stability. Foreign assistance will often be useful first to develop this strategy, and then to train or advise the personnel necessary to the proper functioning of the justice system (including judges, prosecutors, investigators, defense counsel, and police). Attention should also be given to the physical infrastructure and resource needs of the justice system. The priority to be given to the process of criminal accountability for past mass abuses should not be viewed in isolation, but rather should contribute to the medium-term development of a general system of justice and adherence to the rule of law.

The process of criminal justice should be fair, adhering to international standards of due process, and should be transparent, visible and accessible to the population of the country. Public outreach and education with respect to the criminal process should be used for the immediate goals of justice and reconciliation and to develop an appreciation for the rule of law. The media should be incorporated into this effort, lest they undermine it.

Efforts should be undertaken to facilitate constructive and creative interaction between those involved in the international and national prosecution processes, while maintaining the independence of each.

Vetting and non-criminal sanctions will often be an appropriate component of the overall process of reckoning with past abuses, but assistance is necessary to ensure that

this process is transparent, fair and not susceptible to political manipulation.

Truth commissions and criminal justice should not be seen as mutually exclusive. Truth commissions can help establish a societal consensus regarding the broader context and pattern of past abuses in a way not generally achievable in individual criminal trials. Truth commissions should be of limited duration, be given realistic mandates and resources, and should produce historical consensus as well as prospective recommendations.

The process of justice and reconciliation will be shaped by the particular circumstances and history of the country in question, but should be informed by the prior experience of other countries dealing with similar issues. Foreign donors should facilitate this process.

For every country emerging from the horror of genocide, war crimes, or crimes against humanity, or other massive abuses of human rights, achieving justice requires a determination of the proper balance between domestic and international treatment of the problem. That balance point shifts from case to case owing to a variety of factors. Criteria need to be developed to objectively evaluate the availability and effectiveness of domestic procedures in each case, and to decide where the international community should intervene in a formal, institutionalized manner and where it would be wiser to let local institutions and society grapple on its own with the legacy of past abuses. The following guidelines should inform this evaluation:

A Framework for Determining When International or National Mechanisms Are Called For

1. While the wide-scale abuse of human rights is underway, local mechanisms of accountability are severely compromised and eroded. If the national institutions of justice were actually functioning properly to uphold basic rights and the rule of law, the atrocities in question would not likely be occurring. During this phase, therefore, it is incumbent on the international community to take on the task of accountability for the abuses in question.

To prevent the continuation of mass abuses, the response must be prompt, a quality that has not characterized recent efforts at international criminal accountability. Delays in funding, staffing and organization of the two international tribunals for the former Yugoslavia and Rwanda have undercut their impact to date. It took a year and a half for the Yugoslavia tribunal to issue its first indictment; in the Rwandan case, while the architects of genocide moved about in various countries with relative impunity, the international tribunal did not manage to open its first trial until some two and half years

after the genocide.[14]

This argues strongly in favor of the creation of a permanent international criminal court, which would presumably not be hampered by the kind of start-up delays that have accompanied these ad hoc tribunals. A standing ICC would be able to initiate an investigation upon the first evidence of war crimes, genocide or crimes against humanity, issue indictments promptly and hopefully serve as a very real threat and deterrent to those contemplating the perpetration of these atrocities by making it clear from the outset that they would be held internationally accountable.

Once the core crimes in question have already occurred and ceased, any number of unique circumstances may affect the handling of accountability in the particular case. As a general matter, however, the following prioritization may be useful in determining the appropriate division of labor between international and domestic players.

2. In most countries emerging from a period of massive abuses, the personnel, facilities and culture of the legal system will have to be professionalized and put on the right track (again or for the first time) through a multi-year process. In the rare instance where the national institutions of justice move rapidly into action, without any outside assistance, to deal with these atrocities immediately upon their cessation, there will be legitimate concerns regarding their independence and objectivity and regarding the actual and perceived fairness of any trials which ensue. In this instance, it is important that the international community assume an active monitoring role, both to ensure the fairness and credibility of the process and to reinforce the notion that even where the process is wholly internal, the international community has a strong interest in accountability for mass abuses.

3a. In most cases, the best scenario would be for the international community to provide appropriate assistance to enable a society emerging from mass abuse to deal with the issues of justice and accountability itself. In every case, the ultimate goal is to establish the institutions, structures and culture which combine to form the rule of law. This is the antithesis of, and antidote to, genocide, war crimes and other mass abuses of human rights. National or local handling of accountability for these atrocities is an important first step in this process.

The establishment of credible independent national courts that will adjudicate disputes, defend rights and hold criminals to account, as well as the use of other domestic

[14]In his final report to the Secretary of the Army on the Nuremberg proceedings, chief prosecutor Telford Taylor noted that after the initial IMT trial, the need to organize new structures, administration, and staffing for the 12 trials to follow delayed the war crimes program by almost a year. The delay had its cost. "If the trials … had started and been finished a year earlier," observed Taylor, "it might well have been possible to bring their lessons home to the public at large far more effectively." These words ring at least as true half a century later.

mechanisms of accountability, serve a function which cannot be over-emphasized: they allow a society which previously has been victimized and made to feel powerless against the atrocities which engulfed it to reclaim a sense of control over its own destiny. Wholly internationalized responses imply that the country in question is still powerless, still incapable of dealing with its own demons. Instead, for the lessons of an accountability process to be most effectively integrated into the life and culture of the nation, the nation should feel a sense of ownership and investment in that process. This approach calls for a partnership role for the international community in the empowerment of a society victimized by abuse.

The role of outsiders may an informal one. The Special Prosecutor's Office dealing with the abuses of the Mengistu era in Ethiopia, the genocide justice program in Rwanda, and the Truth and Reconciliation Commission in South Africa, as examples, are each completely domestic operations, designed, organized and given their mandate by a national process. Nonetheless, each has also received extensive external assistance, both in the form of financial resources and in terms of intellectual input and technical assistance from numerous foreign government agencies, NGOs, individual foreign experts, and UN bodies. This international assistance has played an important role in shaping these programs of accountability, while leaving the ownership of and responsibility for these programs in local hands. Under this arrangement, the international community must play the same monitoring role referred to above.

3b. Alternatively under this second category, the international role in a domestic process may be a more formal one. One example of this approach is the "Clarification Commission" established this year in Guatemala. As in El Salvador, it was felt that the polarization of local society would make a wholly domestic commission non-viable. At the same time, there was a desire to have a more Guatemalan-owned and less external process of accounting. The result mandated by the peace accords is a national commission, with members representing different Guatemalan perspectives and with an international chairman. As currently envisioned, the Truth and Reconciliation Commission of Bosnia and Herzegovina will similarly be a Bosnian commission with mixed Bosnian and international membership and an international chairman. Along similar lines, some of the human rights and judicial institutions created in Bosnia under the Dayton accords are national institutions which include foreign membership.[15]

This type of arrangement may combine the best of both worlds: it focuses energy on the development of viable national systems of accountability and justice (the international role in which can be reduced and withdrawn when they are self-sustaining). The incorporation of a formalized international presence can render the national mechanism more credible more quickly, ensure that the national process comports with

[15]These include the Constitution Court of Bosnia and Herzegovina and the Commission on Human Rights. It should be noted that these latter institutions deal primarily with current abuses rather than wartime atrocities.

international standards, and facilitate broader international financial and technical assistance to the national institution. In addition, this approach will generally cost far less than creation of a new international institution.

As an example of this question of allocation of international financial resources, the international community is currently spending approximately $41 million a year on the International Criminal Tribunal for Rwanda. The tribunal is serving several important functions, not the least of which is the indictment, apprehension and eventual trial of several key leaders of the genocide who would likely not have been apprehended in their countries of refuge and returned for trial by Rwandan authorities. That said, investing $41 million per year in the rebuilding and training of the Rwandan legal system could produce one of the better justice systems in the region. Although a permanent international criminal court will avoid the incurring of major start-up costs with each new case, this consideration of the cost of pursuing justice through the ICC versus a more substantial investment in the rebuilding of the domestic justice system of the country in question should, at least in some cases, enter into the calculation of which cases will be taken up by the international body.

To be helpful, the international community also needs to act responsibly with respect to the domestic trial process. This entails not only the donation of resources; it also requires a realistic and informed appraisal of the domestic situation in the country in question. Once again, the recent Rwandan experience, with over 100,000 potential genocide defendants, demonstrates the point. Under optimal conditions and with an massive infusion of foreign assistance—neither of which were to be had in Rwanda—it would take years to rebuild a properly functioning legal system in a land so ravaged by genocide, draft and adopt new legislation, appoint and train new investigators, judges, prosecutors, and related staff, repair courthouses to usable condition, and outfit them with, if not computers or typewriters, at least paper and pens for case records, to name but a few of the necessary measures antecedent to the holding of credible trials. Despite all of this, beginning very shortly after the 1994 massacres, some voices in the international community continuously pressed the new Rwandan government to promptly begin the process of domestic prosecution. When Rwandan authorities actually began the first trials in the beginning of 1997, many of these same voices then harshly criticized the Rwandans for starting them too soon, complaining that the Rwandan criminal justice system was not yet ready to ensure proper and fair proceedings. The international community could contribute far more productively to the domestic process of justice and accountability if it would be more forthcoming in its assistance to the domestic system and more pragmatic and realistic in its evaluation.

4) The next best arrangement is likely to be complementary international and national mechanisms of accountability. Again, Bosnia and Rwanda are the most obvious examples of this approach.

At least two situations would warrant this arrangement. First, without undermining

the importance of bolstering national institutions and of national ownership and integration of the process of accountability, there will be cases of crimes so horrific that the international community, for its own sake and the preservation of fundamental universal principles, will be obliged to hold the key planners or perpetrators accountable to all of humanity.

In addition, there will at times be those cases which are too volatile for national mechanisms of accountability to properly handle. In particular, where the transition from the period of mass abuse is the result of a negotiation rather than the defeat and routing of those responsible, the principal leaders of the former regime may be beyond the political reach of the national system of justice. Even if trials of mid- or lower-level participants in past atrocities may be undertaken locally, the attempted prosecution of the principals by domestic authorities could be destabilizing to the new order. Pinochet in Chile, Karadzic and Mladic in Bosnia, Pol Pot in Cambodia, and possibly de Klerk in South Africa come to mind in this regard. In such circumstances, an international criminal court could serve a useful function by handling those cases which the domestic system cannot.

5) Finally, when national efforts at accountability are wholly implausible, an international mechanism becomes essential. This situation may occur, for instance, where domestic capacity has been too heavily devastated by the loss of personnel, the destruction of equipment and facilities, and the erosion of credibility to undertake the effort. It may also be the case when the same elites behind the mass abuses in question continue to dominate the political scene, precluding any serious domestic effort at accountability. This was the case in El Salvador. In a bold move, the UN truth commission decided to issue conclusions regarding the culpability of specific individuals without the benefit and due process protections of a regular criminal procedure; the commission had determined that this step was necessary to establish some minimal level of accountability because none could be had in the still-corrupted Salvadoran courts.[16]

A permanent international criminal court will enable the international community to take on this task far more promptly and effectively than the current arrangement of ad hoc tribunals. Assigning priority to national mechanisms of accountability and granting them some deference and support is generally preferable, but when there is nothing to defer to, international institutions must be able to assume the task of rendering justice in an efficient manner.

6) In a nation's effort to acknowledge and establish accountability for past egregious abuses of human rights, the private sector can also play an important role. It is far preferable that mechanisms for reckoning with these abuses be official mechanisms, demonstrating the state's commitment to the process. Where that commitment is not forthcoming, however, private initiatives by elements of civil society take on heightened

[16]Buergenthal, *supra* note 2, at 522.

importance, whether on their own or as a complement to international efforts at accountability. A significant example of this approach comes from the transition from military rule in Brazil. When the government took no action to deal with the legacy of wide-scale violations of human rights, a project was undertaken under the aegis of the Catholic Church. The resulting report, *Brasil: Nunc Magis*, which used official documents to analyze the nature of the military regime and its abuses, sold over 100,000 copies during within the first ten weeks of its publication.

Conclusion

In all likelihood, it will be the exceptional case in which the use of just one of the accountability mechanisms discussed herein will be the optimal solution; more often, the challenge will be to determine the best-suited mix of approaches. A truth commission followed by prosecution, like in Argentina? Both international and domestic prosecution, à la Rwanda? Trials for some and administrative sanctions for others, following the model of some of the post-World War II and post-communist transitions? In the end, there will be no uniform, mechanistic solution applicable to all cases. With the aid of the international community, each society emerging from genocide, war crimes or sustained mass repression will need to find the specific approach or combination of mechanisms which will best help it achieve the optimal level of justice and reconciliation.

Unfortunately, mass abuses yet to occur will no doubt provide opportunities for the evolution of whole new mechanisms for accountability not presently conceived. Eventually, if domestic and international efforts to ensure accountability for mass abuses become sufficiently well coordinated and effective, they will hopefully someday be needed with less frequency.